No. 83-196

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

v.

MONSANTO COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

REPLY MEMORANDUM FOR THE APPELLANT

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Monsanto asks this Court summarily to affirm the judgment below. It is evident, however, that the various constitutional holdings of the district court cannot be reconciled with the decisions of this Court; and it is equally obvious that a decision striking down substantial portions of a major regulatory statute as unconstitutional warrants plenary review by this Court.

1. Despite Monsanto's effort to cast the 1978 amendments to FIFRA as a broad destruction of its "trade secret" property rights without just compensation, the statute's effects are far more limited than Monsanto suggests.

First, the provisions at issue do not "eliminate Monsanto's hard-earned innovative advantage" (Mot. to Aff. 12). Rather, as we explained in the Jurisdictional Statement (at 18-20), they establish procedures for limited use and disclosure by EPA of only health and safety data (see J.S. 3

& n.2).[1] The data consideration provisions involve disclosure to no one; they simply permit EPA to refer to the original submitter's data when reviewing subsequent applications for the same or similar pesticides. 7 U.S.C. 136a(c). Even then, the exclusive use and compensation periods may afford additional protection to the original data submitter (see J.S. 7-8). The disclosure provisions expressly prohibit disclosure of information that could reveal "manufacturing or quality control processes" or certain details pertaining to "deliberately added" inert ingredients unless "the Administrator has first determined that disclosure is necessary to protect against an unreasonable risk of injury to health or the environment." 7 U.S.C. 136h(d). The original submitter is further protected by the prohibition against disclosure to foreign or multinational pesticide producers, unless the original applicant has consented. 7 U.S.C. 136h(g). Taken as a whole, the statutory scheme creates a carefully circumscribed procedure that ensures the innovative incentives of "head start" protection by limiting disclosure in ways that Congress deemed sufficient for that purpose. Accordingly, Monsanto's concern (Mot. to Aff. 12) that the statute would "eliminate" its "hard-earned innovative advantage" is unfounded.

Second, Monsanto's argument ignores the countervailing public health concerns Congress sought to promote. In both 1972 and 1978, Congress clearly stated that the data consideration and compensation provisions were enacted to achieve an efficient registration system and to prevent the monopoly effects that would be created if the data submitter retained de facto control over the use of the data. S. Rep.

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[1] The district court stated (J.S. App. 21a) that while the data submitted in support of a pesticide application may serve other corporate objectives, Monsanto generates this data "primarily for registration purposes."

95-334, 95th Cong., 1st Sess. 3, 7-8, 30-31 (1977); H.R. Rep. 95-663, 95th Cong., 1st Sess. 18, 41, 42 (1977); S. Rep. 92-970, 92d Cong., 2d Sess. 12 (1972); S. Rep. 92-838, 92d Cong., 2d Sess., Pt. II, at 69, 72-73 (1972). Congress also determined that the public interest in minimizing the environmental hazards of pesticides would be served by disclosure of the specified safety and health data. S. Rep. 95-334, *supra*, at 4, 13; H.R. Rep. 95-663, *supra*, at 18-19, 42. It was entirely proper for Congress to exercise its power to regulate interstate commerce to achieve these objectives. See, *e.g.*, *Hodel* v. *Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 282 (1981); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System*, 419 U.S. 281, 298 (1974). Monsanto asserts (Mot. to Aff. 22-23) that the desire to promote competition is merely a "theoretical" justification and that the benefits accorded to its competitors constitute an impermissible private use. This contention is, as we have described, unfounded. In any event, this Court has clearly held that the judiciary should not substitute its judgment for congressional assessment of the public need or wisdom of benefitting private parties to further the public welfare. *Hodel* v. *Indiana*, 452 U.S. 314, 326 (1981); *Berman* v. *Parker*, 348 U.S. 26, 32-34 (1954).

2. Monsanto is also incorrect in asserting that FIFRA's data consideration and disclosure provisions constitute a taking of its property. As we have explained (J.S. 17-22), this Court has held that in analyzing whether a taking has occurred one must look to "the character of the [governmental] action and * * * the nature and extent of the interference with rights in the [property] as a whole." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 130-131 (1978). Here, as we have shown, the limited interference involved arises from a "public program adjusting the benefits and burdens of economic life to promote the common good" (*id.* at 124), and this fact, ignored by Monsanto, weighs heavily against the conclusion of a taking.

Indeed, the decision on which Monsanto relies (Mot. to Aff. 15), *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), is consonant with our position (*id.* at 163):

> This Court has been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare. See, *e.g.*, *Andrus* v. *Allard*, 444 U.S., at 64-68; *Penn Central Transportation Co.* v. *New York City*, 438 U.S., at 125-129.[2]

3. Several additional points in Monsanto's submission invite brief response.

a. Monsanto mistakenly relies (Mot. to Aff. 13) on a stipulation in this case regarding the classification of its data as trade secrets within the Restatement of Torts (1939) definition. The purpose of the stipulation was to avoid protracted litigation over the characterization of the data under that definition. While the stipulation discusses property rights, it does not concede that Monsanto's interests in the data at issue are protected as property under the Fifth Amendment. Instead, the stipulation merely states that such protection "may" exist. Whether it does is one of the questions presented for review.

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[2]The Court's conclusion in *Webb's Fabulous Pharmacies* that a taking had occurred in the "narrow circumstances" of that case (449 U.S. at 164) does not undercut the more general principles recited above. Indeed, the Court expressly reserved the question whether the same practice it proscribed in *Webb's* would be constitutional in another context. *Id.* at 165.

b. Similarly misplaced is Monsanto's reliance (Mot. to Aff. 15 & n.11) on EPA regulations governing disclosure under the Freedom of Information Act. 40 C.F.R. 2.201(i), 2.208, 2.307(g). See *National Parks and Conservation Association* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). That data submitted under FIFRA are not considered to be "voluntarily submitted" for FOIA purposes does not answer the constitutional questions here presented. The FOIA regulations do not change the fact that Monsanto chose to seek registration of its pesticides and acted on its decision by submitting the health and safety data at issue here. Just as an applicant for a patent chooses to make the necessary disclosures in order to obtain the benefits of exclusive use, so too does a pesticide registrant choose to reveal to the government certain information in exchange for the commercially valuable authorization to sell its product.

For these reasons and those stated in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted.

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